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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDALL ALLEN SEXTON,

Defendant and Appellant.

C067123

(Super. Ct. Nos.
CM033457 & CM033616)

Defendant Randall Allen Sexton was convicted in case Nos. CM033457 and CM033616 of possessing methamphetamine and was placed on Proposition 36¹ probation. After he admitted violating probation, the trial court revoked his probation and sentenced him to prison.

On appeal, defendant contends the trial court erred in sentencing him to state prison after only his first violation of

¹ Proposition 36 is codified, in part, in Penal Code sections 1210 and 1210.1; further unspecified statutory references are to the Penal Code.

Proposition 36 probation, and challenges the court's finding that he impliedly refused drug treatment probation by failing to enroll and participate in a drug treatment program as required by his probation. Defendant also claims entitlement to one additional day of conduct credit, a claim with which the People agree.

We shall order the judgment amended to include an additional day of conduct credit, and shall affirm the judgment as modified.

BACKGROUND

In case No. CM033457, defendant pled guilty to possessing methamphetamine; in case No. CM033616, he pled no contest to the same charge.

At a hearing held on July 20, 2010,² the trial court placed defendant on three years of formal probation for his two possession offenses pursuant to section 1210.1 (Proposition 36), on various terms and conditions. The court ordered defendant: to report to behavioral health at 8:00 a.m. on July 26; to report to his probation officer at 8:00 a.m. on July 28; to appear at a review hearing before the court on August 5; to refrain from use and possession of controlled substances; to attend 12-step program meetings once a day; and to enroll in a substance abuse class, and participate in and complete a drug treatment program.

² Further unspecified dates are to events occurring in 2010.

Defendant was two hours late for his July 26 behavioral health intake appointment; it was rescheduled for 8:00 a.m. on August 2, but defendant failed to appear. When defendant also missed his probation department indoctrination appointment on July 28, a petition was filed alleging that these two omissions constituted violations of probation.

The hearing on the petition was set for August 5, at the same time as defendant's probation review. He failed to appear for either; consequently, his probation was revoked and a bench warrant issued. Defendant did not report to his probation officer for supervision thereafter, nor did he report to the behavioral health center. On September 16, defendant sought help for his bipolar disorder and drug problem from Feather River Tribal Health Patient Services, but he missed the second appointment and failed to complete the application process. He was ultimately arrested in late October.

At the probation violation hearing, defendant admitted violating probation by failing to appear as ordered on July 26 for the behavioral health intake appointment; the allegation for failing to appear as ordered on July 28 for his probation department appointment was dismissed with a *Harvey*³ waiver.

Citing *People v. Guzman* (2003) 109 Cal.App.4th 341 (*Guzman*), the court found that, although defendant's violation of probation was his first "drug-related strike," defendant's

³ *People v. Harvey* (1979) 25 Cal.3d 754.

ongoing failure to appear for treatment demonstrated he was ineligible to participate in Proposition 36 probation.

DISCUSSION

I

Prison Sentence

Defendant contends the trial court erred in sentencing him to state prison after only his first violation of Proposition 36 probation.

Proposition 36, codified in part in sections 1210 and 1210.1, provides that a person convicted of a nonviolent drug possession offense shall receive probation, and the court shall require completion of an appropriate drug treatment program as a condition of probation. (§ 1210.1, subd. (a).) "By its terms, Proposition 36 requires the court to grant probation with a drug treatment condition to any person convicted of a nonviolent drug possession offense and prohibits incarceration as a condition of probation." (*People v. Davis* (2003) 104 Cal.App.4th 1443, 1446; *People v. Myers* (2009) 170 Cal.App.4th 512, 516.)

A defendant who is on probation pursuant to Proposition 36 can only have that probation revoked in accordance with the terms of the statutory scheme. (*Guzman, supra*, 109 Cal.App.4th at p. 347.) Proposition 36 gives offenders several chances at probation before permitting a court to impose custody time for a violation. Generally, "a defendant loses the protection of [Proposition 36] only after violating a drug-related condition of probation three times." (*Guzman, supra*, at p. 348.)

However, section 1210.1, subdivision (b), sets forth five categories of individuals who are *ineligible* for probation under subdivision (a). One category is defendants who "refuse[] drug treatment as a condition of probation." (§ 1210.1, subd. (b)(4); *Guzman, supra*, 109 Cal.App.4th at p. 346.) A trial court may view a defendant's refusal to enroll in drug treatment as an implied refusal to accept drug treatment as a probation condition, warranting denial of Proposition 36 probation. (§ 1210.1, subd. (b)(4) [Proposition 36 does not apply to defendant who refuses drug treatment as probation condition]; *Guzman, supra*, at pp. 349-350 [trial court did not err in concluding defendant's failure to report to drug treatment facility was a refusal to accept drug treatment within meaning of § 1210.1, subd. (b)(4)]; *People v. Johnson* (2003) 114 Cal.App.4th 284, 300 (*Johnson*).)

Defendant contends that the trial court erred in finding that he was ineligible for further Proposition 36 probation for having effectively refused drug treatment. We review this factual finding under the substantial evidence standard. (*People v. Rios* (2011) 193 Cal.App.4th 584, 589.)

The People maintain that the trial court essentially made the same factual findings that were made in *Johnson, supra*, 114 Cal.App.4th at page 303, and the present case is also analogous to *Guzman, supra*, 109 Cal.App.4th at pages 344 to 350.

We agree with the People. In *Guzman*, the defendant had been placed on Proposition 36 probation and had made no effort to comply with the drug treatment condition of probation.

(*Guzman, supra*, 109 Cal.App.4th at p. 349.) The trial court expressly found that "by his actions, he has refused to accept treatment" (*Guzman, supra*, at p. 345.) Further, the court commented: "Hence, this is not a case in which a defendant commences drug treatment and falters. This is not a case in which a defendant responded to a family emergency and then voluntarily reported to his probation officer for supervision or the drug treatment center for treatment. This is a case in which defendant, by his acts and omissions, evinced a complete and unequivocal refusal to undergo drug treatment." (*Id.* at p. 350.)

Similarly, in *Johnson*, the defendant was on Proposition 36 probation and failed to appear at the probation review hearing, failed to report to the probation department, and failed to enroll in the court-ordered drug treatment program. (*Johnson, supra*, 114 Cal.App.4th at pp. 298-299.) The *Johnson* court concluded that the defendant before it was similar to the defendant in *Guzman* in that she, like the defendant in *Guzman*, had demonstrated a "'complete and unequivocal refusal to undergo drug treatment,'" and had thereby rendered herself ineligible for further probation under Proposition 36. (*Johnson, supra*, at p. 300, italics omitted.)

Here, as in the cases described above, the trial court's conclusion that defendant had impliedly refused treatment under Proposition 36 is supported by the record. Defendant missed his behavioral health intake appointment on July 26, and failed to return at the rescheduled appointment time. He never complied

with the probation conditions that he refrain from using controlled substances, attend 12-step program meetings, enroll in a substance abuse class, and participate in a drug treatment program. Rather, as the trial court noted at sentencing, defendant *disappeared* for three months after his release on probation. He did not commence drug treatment and faltered. He *never* voluntarily complied with *any* component of the drug treatment conditions of his probation. By his acts and omissions, including his failure to report to probation for three months, defendant displayed a complete and unequivocal refusal to undergo drug treatment.

Although defendant accepted drug treatment at his initial sentencing hearing, "the eligibility requirements [for Proposition 36] continue to apply even after the initial grant of probation." (*Guzman, supra*, 109 Cal.App.4th at p. 350.) Because defendant's "subsequent actions revealed the disingenuousness of [his] request for drug treatment" (*Guzman, supra*, at p. 349), the trial court did not violate the statutory mandate of Proposition 36 by revoking probation and sentencing him to prison.

II

Conduct Credit

Defendant also contends the trial court erred in awarding him 77 actual days of custody credit, but only 76 days of conduct credit. The People concede the error and we agree.

At the time of defendant's offenses and convictions, section 4019 provided for the accrual of presentence credits at

twice the previous rate. New (now former) subdivisions (b)(1) and (c)(1) of section 4019 provided that one day of work credit and one day of conduct credit may be deducted for each four-day period of confinement or commitment. According to revised former subdivision (f), "if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody." (§ 4019, former subd. (f); see also Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50 [effective Jan. 25, 2010].)

On September 28, 2010, as an urgency measure effective on that date, the Legislature enacted Senate Bill No. 76 (2009-2010 Reg. Sess.), which amended (now former) section 2933 (Stats. 2010, ch. 426, § 1) regarding presentence conduct credits for defendants sentenced to state prison. That amendment gives qualifying prisoners one day of presentence conduct credit for each day of actual presentence confinement served (§ 2933, former subd. (e)(1), (2), (3)). Neither defendant's current conviction nor his criminal record disqualify him from that formula. (§ 4019, former subds. (b) & (c).)

Defendant was sentenced on December 16, and is entitled to the benefit of the statutes in effect at the time of sentencing: the version of section 4019 made effective January 25, 2010 and in effect at the time of his convictions, and the amended version of section 2933, effective September 28, 2010.

DISPOSITION

The abstract of judgment is ordered modified to reflect 77 days of conduct credit. As modified, the judgment is

affirmed. The trial court is directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

DUARTE, J.

We concur:

RAYE, P. J.

MURRAY, J.